

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD GARCIA III,

Defendant and Appellant.

E068394

(Super.Ct.No. SWF1401505)

OPINION

APPEAL from the Superior Court of Riverside County. Kelly L. Hansen, Judge.

Affirmed with directions.

Marianne Harguindeguy, under appointment by the Court of Appeal, for  
Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney  
General, Julie L. Garland, Assistant Attorney General, Barry Carlton, Melissa Mandel,  
Tammi Hennick and Mary K. Strickland, Deputy Attorneys General, for Plaintiff and  
Respondent.

Defendant and appellant Richard Garcia III entered a plea agreement and pled guilty to kidnapping (Pen. Code<sup>1</sup>, § 207, subd. (a), count 3), child abuse resulting in great bodily injury (§§ 273a, subd. (a), 12022.7, subd. (d), count 4), inflicting corporal injury upon a spouse, resulting in a traumatic condition (§ 273.5, subd. (a), count 6), and child abuse (§ 273a, subd. (b), counts 11-13). He also admitted he had a prior serious felony conviction (§ 667, subd. (a)) and a prior strike conviction (§§ 1170.12, subd. (c)(1), 667, subds. (c) & (e)(1)).<sup>2</sup> Approximately five months later, defendant moved to withdraw his plea. Following a hearing, a trial court denied the motion. The court then sentenced him to a total of 21 years in state prison in accordance with the plea agreement.

This matter has been transferred here from the Supreme Court with directions to vacate our previous decision and to reconsider the cause in light of newly enacted Senate Bill No. 1393 (2017-2018 Reg. Sess.) (SB 1393). In our earlier opinion, defendant contended that the trial court abused its discretion in denying his motion to withdraw the plea, and we affirmed. We have vacated our previous decision. We now conclude remand is necessary to allow the trial court to exercise its discretion whether to strike the prior serious felony conviction for sentencing purposes, pursuant to SB 1393. (§ 667, subd. (b).) In all other respects, we affirm.

---

<sup>1</sup> All further statutory references will be to the Penal Code, unless otherwise noted.

<sup>2</sup> The court dismissed the other counts charged in the information, upon the People's motion.

## FACTUAL BACKGROUND<sup>3</sup>

Defendant was living with his girlfriend, who had four children. One night, defendant was trying to put his girlfriend's son (the victim) to bed. The victim would not listen, so defendant beat him. When his girlfriend tried to intervene, defendant grabbed her neck and pushed her against the wall. He picked up the victim, told his girlfriend he was taking him to the hospital, carried him to his car, and left.

Defendant was interviewed by the police about the incident, and he agreed to speak to them after being read his rights. Defendant said he told the kids to go to bed, but the victim would not listen. Defendant became angry and kicked the victim in his abdomen and rib area. He then carried the victim by the neck into his room and punched him several times; he also slammed him into the wall.

## ANALYSIS

### I. The Trial Court Properly Denied Defendant's Motion to Withdraw His Plea

Defendant argues the court erred in denying his motion to withdraw his guilty plea. He challenges the validity of his guilty plea on the ground of ineffective assistance of counsel (IAC). We conclude that the court properly denied the motion.

#### *A. Procedural Background*

On October 12, 2016, prior to orally entering his plea, defendant signed and initialed a two-page plea agreement. The agreement provided that he would plead guilty to counts 3, 4, 6, and 11 through 13. Defendant initialed the box next to item C.4., which

---

<sup>3</sup> This brief summary of the facts is derived from the preliminary hearing transcript.

states: “I have had adequate time to discuss with my attorney (1) my constitutional rights, (2) the consequences of any guilty plea, and (3) any defenses I may have to the charges against me.” He also initialed the box next to item C.2., which states: “No one has made any threats to me or anyone close to me, or placed any pressure of any kind on me in order to make me plead guilty.” Defense counsel signed the portion of the plea agreement providing that he was satisfied that “(1) the defendant understands his/her constitutional rights and understand[s] that a guilty plea would be a waiver of these rights; (2) the defendant has had an adequate opportunity to discuss his/her case with me, including any defenses he/she may have to the charges; and (3) the defendant understands the consequences of his/her guilty plea.” Counsel joined in the decision of defendant to enter a guilty plea.

At the taking of defendant’s plea, the court asked defendant if he went over the plea form with his attorney and if he signed the form indicating he understood it and agreed with the terms. Defendant replied that he had. The court reviewed his rights, the charges, and the penalties and punishment, and asked if defendant understood everything. He replied that he did. Defendant orally entered a plea of guilty to counts 3, 4, 6, and 11 through 13, as read by the court. The People were satisfied with the factual basis for the plea. Defendant also admitted he had one prior serious felony conviction and one prior strike. The court asked if defense counsel joined in the pleas, and he did. The court then accepted the plea, finding that defendant knowingly, intelligently, and voluntarily entered into the plea, and there was a factual basis for the plea.

On March 28, 2017, defendant filed a motion to withdraw his plea. The prosecutor filed an opposition on March 30, 2017.

On April 21, 2017, the trial court held a hearing on the motion. The court indicated that it had reviewed defendant's motion, as well as the opposition. Defendant testified that his counsel did not thoroughly review the written plea agreement with him, talk to him about the consequences of the plea, or explain his rights. He added that his attorney never went over the charges with him or explained anything. Defendant confirmed that the judge asked him questions about whether he went over the form with his attorney and if he had any questions. However, defendant said he was crying a lot that day, so he did not pay attention to everything the court said. He said he was emotional that day and ended up losing his mother.

The court was the same one that took defendant's plea. After hearing argument from counsel, the court stated that it had gone over the pleadings and took judicial notice of the transcript from the prior proceeding. It noted that defendant had pled guilty on several prior cases, including two felonies, and was familiar with the process of filling out a change of plea form and the consequences of a guilty plea. The court stated that it had no independent recollection of the actual plea colloquy in this case; however, it noted that it would have been its habit and custom to ask defense counsel if he needed more time with defendant, if, in fact, defendant was tearing up, was unable to focus on what was going on, or was distracted. The court said it understood this was a serious case, since defendant, a young man, was pleading guilty to 21 years in state prison. Thus, the court said it would have been looking for some signs that defendant was not engaged in

the change of plea. However, there was nothing in the record indicating any of that. The court then found, as it did on the day of the plea, that defendant was aware of the consequences of the plea, was aware of what he was pleading to, and admitted the factual basis for the crimes. The court concluded that defendant's plea was knowing, intelligent, and voluntary, and therefore denied the request to withdraw his plea.

### B. *Standard of Review*

“A defendant who seeks to withdraw his guilty plea may do so before judgment has been entered upon a showing of good cause. [Citations.]” (*People v. Weaver* (2004) 118 Cal.App.4th 131, 145; see § 1018.) “To establish good cause, it must be shown that defendant was operating under mistake, ignorance, or any other factor overcoming the exercise of his free judgment. [Citations.] Other factors overcoming defendant's free judgment include inadvertence, fraud or duress. [Citations.] However, ‘[a] plea may not be withdrawn simply because the defendant has changed his mind.’ [Citation.]” (*People v. Huricks* (1995) 32 Cal.App.4th 1201, 1208 (*Huricks*)). “ ‘The burden is on the defendant to present clear and convincing evidence the ends of justice would be subserved by permitting a change of plea to not guilty.’ [Citation.]” (*Weaver*, at p. 146.)

Furthermore, “the two-part *Strickland v. Washington* [(1984) 466 U.S. 668, 687] test applies to challenges to guilty pleas based on ineffective assistance of counsel.” (*Hill v. Lockhart* (1985) 474 U.S. 52, 58.) The first half of the *Strickland* test requires defendant show that counsel's performance was deficient. (*People v. Shokur* (2012) 205 Cal.App.4th 1398, 1407; *Hill v. Lockhart*, *supra*, 474 U.S. at p. 58.) “[I]n order to satisfy the ‘prejudice’ requirement, the defendant must show that there is a reasonable

probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (*Hill v. Lockhart*, at p. 59.)

“ ‘Withdrawal of a guilty plea is left to the sound discretion of the trial court. A denial of the motion will not be disturbed on appeal absent a showing the court has abused its discretion.’ [Citations.]” (*Huricks, supra*, 32 Cal.App.4th at p. 1208.)

*C. There Was No Abuse of Discretion*

Defendant contends he should have been allowed to withdraw his guilty plea because he accepted a plea deal based on his counsel's ineffective assistance. Specifically, he claims that his trial counsel: (1) failed to provide accurate information about the consequences of the plea; (2) misinformed him about his conduct credit eligibility; (3) failed to discuss possible defenses or “enhanced punishment for subsequent offenses that arise from pleading to strike offenses and domestic violence offenses”; and (4) took advantage of his heightened emotional state to pressure him into accepting the plea deal. Defendant essentially claims his testimony constituted good cause for withdrawal of the plea. We conclude that he has failed to establish IAC or prove by clear and convincing evidence that any of these contentions provided good cause to withdraw his plea.

First, defendant fails to show that his counsel's performance was deficient. He cannot demonstrate that his attorney failed to accurately inform him about the consequences of the plea, the conduct credits, possible defenses, or punishment. To the contrary, defendant expressly informed the trial court that he went over the plea form with his counsel. On his plea form, defendant initialed the box next to item C.4., which

states: “I have had adequate time to discuss with my attorney (1) my constitutional rights, (2) the consequences of any guilty plea, and (3) any defenses I may have to the charges against me.” Defendant also answered in the negative at the plea hearing when the court asked if he had any questions about the plea form. He answered in the affirmative when the court asked if he understood that he would be subject to increased penalties if he was convicted of any future felony, since he would be pleading to multiple prior convictions. Furthermore, defense counsel signed the portion of the plea agreement providing that he was satisfied that “(1) the defendant understands his/her constitutional rights and understand[s] that a guilty plea would be a waiver of these rights; (2) the defendant has had an adequate opportunity to discuss his/her case with me, including any defenses he/she may have to the charges; and (3) the defendant understands the consequences of his/her guilty plea.” He signed the plea agreement stating that he joined in defendant’s decision to enter a guilty plea.

Defendant has also not shown that his counsel pressured him into entering the plea agreement by taking advantage of his heightened emotional state. “Nothing in the record indicates [defendant] was under any more or less pressure than every other defendant faced with serious felony charges and the offer of a plea bargain.” (*Huricks, supra*, 32 Cal.App.4th at p. 1208.) The only evidence defendant cites is his own testimony, which the trial court apparently rejected when it denied the motion to withdraw the plea. Moreover, at the plea hearing the court found that defendant’s plea was free and voluntary, and defendant did not indicate otherwise. Additionally, at the hearing on the motion to withdraw, the court indicated that it was the same court that took the plea. The



court stated that it was its habit and custom to stop proceedings and ask if defense counsel needed more time with his client, if a defendant was expressing emotional distress, was unable to focus, or was distracted. Although the court had no specific recollection of taking defendant's plea, it noted there was no indication in the plea hearing transcript that defendant was emotionally distressed.

Furthermore, defendant has not demonstrated prejudice as to any of his claims. In other words, he has not shown that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (*Hill v. Lockhart, supra*, 474 U.S. at p. 59.) He merely points to his self-serving testimony showing that "his heightened emotional state surrounding his mother's illness had been manipulated to convince him to plead guilty," that he asked to be referred to mental health services after his plea, and that he failed to recall details of the day of the plea. Defendant also asserts that he was reluctant to plead guilty. He points to his testimony that his attorney told him he could either take the deal or there was nothing else he could do for him, and that he told his attorney he did not know what he was going to do. Defendant further claims his account of a phone call he made to his attorney after the plea "suggests that he had relied on inaccurate information from his attorney when he accepted the plea." He also states his decision to withdraw his plea "was directly related to learning that he would be eligible for only 15 percent custody credits, which was contrary to the information provided by counsel." Nothing in any of these assertions establishes that, but for counsel's alleged errors, defendant would not have pled guilty and would have insisted on going to trial.

Ultimately, none of defendant's claims establish good cause for withdrawing his plea, since they do not demonstrate that he was operating under mistake, ignorance, or inadvertence, or that the exercise of his free judgment was overcome. (See *People v. Nance* (1991) 1 Cal.App.4th 1453, 1456.) As the trial court observed, defendant was aware of the consequences of his plea, was aware of what he was pleading guilty to, and "his plea was knowingly, intelligently, and voluntarily entered into." The court was well within its discretion when it denied defendant's motion to withdraw the plea.

## II. Remand is Necessary

Defendant contends he is entitled to a remand to permit the trial court the opportunity to exercise its discretion to strike his prior serious felony conviction, pursuant to SB 1393. We agree.

At the time defendant was sentenced, the trial court had no power to strike a prior serious felony conviction, for purposes of eliminating a five-year sentence enhancement under section 667, subdivision (a). (See former § 1385, subd. (b).) While this appeal was pending, however, the Governor signed SB 1393 which, effective January 1, 2019, amended sections 667, subdivision (a), and 1385, subdivision (b), to allow a court to exercise its discretion to strike a prior serious felony, in the interest of justice. (Stats. 2018, ch. 1013, §§ 1-2; *People v. Pride* (2019) 31 Cal.App.5th 133, 142 (*Pride*).) The parties agree that SB 1393 applies to defendant retroactively. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 972-973 (*Garcia*).)

While defendant contends the matter should be remanded to allow the trial court the opportunity to exercise the discretion recently granted by the Legislature, the People

contend that remand is unnecessary. The People assert that defendant agreed to be sentenced five years on the prior serious felony enhancement, in exchange for a generous plea deal. Furthermore, the trial court's statements demonstrate that it would not have dismissed the prior serious felony enhancement, even if it had the discretion to do so, based on defendant's agreement with the prosecutor. We conclude that remand is necessary.

We initially note the general standard for assessing when remand is required for a trial court to exercise sentencing discretion. “ ‘[W]hen the record shows that the trial court proceeded with sentencing on the . . . assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.]’ ” (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 (*McDaniels*)). However, “if ‘ ‘the record shows that the trial court would not have exercised its discretion even if it believed it could do so, then remand would be an idle act and is not required.’ ’ ” (*Ibid.*) Courts have applied this standard in the context of Senate Bill No. 620, which gave trial courts discretion to strike allegations subjecting a defendant to sentence enhancements under section 12022.53, where such discretion had previously been prohibited (former § 12022.53, subd. (h)). (*Id.* at pp. 424-425; *People v. Chavez* (2018) 22 Cal.App.5th 663, 712-713.) We see no reason why this same standard would not apply in assessing whether to remand a case for resentencing in light of SB 1393. The People agree that authority pertaining to Senate Bill No. 620 is instructive.

Furthermore, we note that plea agreements are “ ‘a form of contract,’ and their terms, like the terms of any contract, are to be enforced. [Citations.] Unless a plea agreement contains a term requiring the parties to apply only the law in existence at the time the agreement is made, however, ‘the general rule in California is that the plea agreement will be “ ‘deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy.’ ” ’ ” (*People v. Hurlic* (2018) 25 Cal.App.5th 50, 57 (*Hurlic*)).

In *Hurlic, supra*, 25 Cal.App.5th 50, the court concluded that because the defendant’s plea agreement “[did] not contain a term incorporating only the law in existence at the time of execution, [the] plea agreement will be ‘deemed to incorporate’ the subsequent enactment of Senate Bill No. 620, and thus give defendant the benefit of its provisions without calling into question the validity of the plea.” (*Id.* at p. 57.) Thus, the court remanded the case to the trial court to exercise its discretion whether to lessen the defendant’s sentence pursuant to amended section 12022.53, subdivision (h). (*Id.* at p. 59.)

Here, the plea agreement similarly did not include a term that defendant would not be subject to future changes in the law. Thus, the general rule applies, and the plea agreement should be deemed to incorporate future changes in the law, such as SB 1393. (See *Hurlic, supra*, 25 Cal.App.5th at p. 57.) Furthermore, “[i]t follows, also as a general rule, that requiring the parties’ compliance with changes in the law made retroactive to them does not violate the terms of the plea agreement, nor does the failure of a plea

agreement to reference the possibility the law might change translate into an implied promise the defendant will be unaffected by a change in the statutory consequences attending his or her conviction. To that extent, then, the terms of the plea agreement can be affected by changes in the law.” (*Doe v. Harris* (2013) 57 Cal.4th 64, 73-74.)

Moreover, we cannot say the record shows the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to lessen defendant’s sentence. Nothing in the trial court’s imposition of the stipulated sentence demonstrates what it would do with the newly afforded discretion under SB 1393. We conclude the trial court must be afforded the opportunity to exercise this sentencing discretion. (See *McDaniels, supra*, 22 Cal.App.5th at p. 425; *Garcia, supra*, 28 Cal.App.5th at pp. 973-974.)

#### DISPOSITION

The matter is remanded to the trial court for the limited purpose of allowing the trial court to exercise its discretion pursuant to sections 667, subdivision (a), and 1385, as amended by SB 1393. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER  
Acting P. J.

We concur:

SLOUGH  
J.

FIELDS  
J.